United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1065

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for the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK WINGATE,
KENNETH LUKE SMITH,

Defendants-Appellants.

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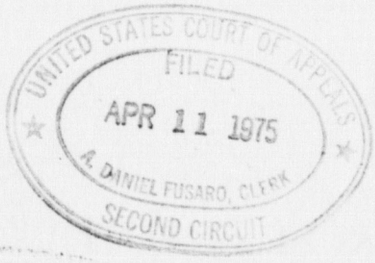

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PRELIMINARY STATEMENT PURSUANT TO RULE 28(3)

This is an appeal from a judgment of conviction after trial by jury before Judge Marvin Frankel. Appellant Smith was convicted of conspiracy to violate the narcotics law. (21 U.S.C. 812, 841(a), 841(b), (1) (A). The sentence imposed was that appellant Smith was placed on probation for three years (Tr 457)*

The notice of appeal was filed on the 25th day of February 1975. On February 28, 1975 this court assigned Joyce Krutick Barlow of the firm of Barlow, Katz & Barlow as counsel for this appeal. Mrs. Barlow was also trial counsel in the District Court.

*References to Trial Transcript-Tr
References to Hearing-H
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QUESTIONS PRESENTED

1. Should the trial court have determined defendant Smith's application to suppress the statements for lack of probable cause upon the merits?

2. Does the record of this trial indicate that the Government, upon lawful evidence, proved its case against appellant Smith beyond a reasonable doubt?

3. Was the manner in which the Government secured the statements from appellant Smith lawful and proper or should the statements have been suppressed?

STATEMENT OF FACTS

Hearing on Motion

Immediately preceding trial and on December 27, 1974, the court held on oral hearing on defendant's motion to suppress the written and recorded statement of appellant Smith. This statement was taken by Assistant United States Attorney Daniel Murphey, prior to defendant's arraignment on July 2, 1974, as well as after Mr. Smith's arrest and detention by DEA agents, for a period in excess of eleven hours. Appellant emphasizes here the fact that the hearing was to deal with the written and recorded statement, since neither the appellant Smith nor his counsel, had been aware that the Government was going to introduce oral admissions obtained at DEA headquarters during the period of arrest and detention.

It is only in this hearing which took place so near to trial, (trial began that very day, December 27, 1974) that appellant Smith became apprised by means of the hearing, that the United States Government had, in violation of the court order of Judge Frankel (issued on December 20) failed to provide discovery of all statements, whether oral or written. The order, in part read, "Request Number 1 is granted as to any oral statements by defendant Smith, and denied as to any by the codefendant. Thus, defense counsel learned only at this hearing, that the Government had wrongfully withheld the most significant and damaging statement. (Ex. 7)

Notwithstanding the order, Judge Frankel nevertheless ignored his own order and allowed said statement to be continually introduced and referred to throughout the course of the trial.

This error by the court in derrogation of defendant's rights under the court order for discovery of the oral statement, when examined with the fact that in that same hearing, Judge Frankel refused to consider the issue of probable cause, placed defendant in a position of the gravest of prejudice and violated his constitutional rights.

REQUEST FOR PROBABLE CAUSE HEARING

On Christmas Eve, at approximately 4:55 P.M., the Government turned over to defense counsel 3500 material. In examining said material, it became clear that the Government had no knowledge of appellant Smith nor did the Government know of his existence prior to his arrest. It further then became obvious that the arrest of appellant Smith totally failed to meet the requisite conditions of probable cause. Accordingly, defense counsel at this hearing (at which she would learn the existence of the oral statement) requested of the court that it make findings and hear the issue of probable cause. Her statement to the court in this respect was as follows:

> MRS. BARLOW: Your Honor, I will explain that. I was not aware of the circumstances with regard to what knowledge the agents had prior to today. And the first discovery of any of this material, and that is what I consider to be knowledge of the agents on the night that they arrested my client, was given to me, as I explained yesterday morning, was at 4:55 P.M., Tuesday, the 24th of December, and it was given to me in the form of the grand jury minutes with regard to my client and in the

form of the DEA report of investigation sheet. I had not seen any of this material prior to this time, nor had I been aware of the lack of information with regard to my client's dealings in this situation.

Further, your Honor, I had a conversation with Mr. Fortuin immediately before receiving this material on Tuesday on the telephone, at which time he informed me that he had no evidence against my client other than my client's statement.

I read the grand jury minutes and I have found that there is no evidence in the grand jury minutes to show that the agent had any knowledge at the time that he arrested my client that my client was involved in a conspiracy to sell drugs, nor did they have any knowledge that he was involved in an attempted sale of narcotics. And I submit to the court that there was no probable cause, and the very reason that is being brought to the court at this late date is that I didn't have this information until yesterday. (H 11)

Defense counsel then further went on to alternatively apprise the court that it was her position that in light of the attending circumstances, appellant Smith's written and

formal motion was of such a nature as to encompass the question of probable cause. Her statement in this respect reads:

> MRS. BARLOW: Your Honor, may I state the motion was made in another form before your Honor on the 15th of November when I asked your Honor to dismiss--inspect the grand jury minutes in camera and dismiss the indictment upon the ground that we did not believe there was probable cause to hold the defendant on the basis of the evidence presented, and your Honor at that time refused to inspect the grand jury minutes?
>
> THE COURT: Mrs. Barlow, I don't know if you are familiar with federal practice. I trust you are.
>
> MRS. BARLOW: I am, your Honor.
>
> THE COURT: And I think the state practice is not different. A motion to dismiss an indictment is not another form of a motion to suppress a statement. And it is your job as an attorney to make clear to the court what kind of motion you are making. It is not your job to try to tell me on the morning of trial that things distinctly from each other are different forms of the same thing.

That is not useful to your client because it is not helpful to the court. Don't do that any more.

Now, are you ready to proceed with your motion to suppress which was timely made? (H13-14)

Indeed, defense counsel in the underlying affidavit to the formal motion factually alleged the position of lack of probable cause in paragraph 5 of the affidavit of Robert A. Katz, Esq., dated November 13, 1974. (Exhibit 12)

It appears that the case against defendant Smith rests upon the mere fact that he was in a car at the airport where the arrest took place. The car ride to the airport is the sole act alleged in the indictment. This, it seems, is all the evidence submitted to the grand jury, except perhaps, a statement taken from defendant Smith in violation of his 4th, 5th and 14th amendment rights, and tapes recorded in violation of defendant's 4th, 5th and 14th amendment rights. I, therefore, request that the court allow defense counsel to inspect the grand jury minutes so that a motion can be prepared to test the legal sufficiency of the indictment.

Further, the motion in clear and express language in its paragraph 4 thereof contained a request of suppression under Rule 41 of the Federal Rules of Criminal Procedure and that portion of the motion did read:

> Pursuant to Rule 41 of the Federal Rules of Criminal Procedure suppressing the statements of the defendant Smith any statements of the co-defendant Wingate or any named co-conspirator and all recordings and wire taps on the ground that such statements or recordings violate the rights of the defendant Smith and more particularly his right under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States of America and defendant Smith requests such other and further relief as to the court may seem just and proper in the premises. (Ex. 12)

It is appellant's position that in view of the written language of the motion, the court's denial of defendant's request to allow the hearing to encompass the issue of probable cause must be deemed prejudicial and constitutional error. The court's statement totally ignored the fact that there was pending a motion to suppress for the court's consideration in its statement that:

> THE COURT: And I think the state practice is not different.

A motion to dismiss an indictment is not another form of a motion to suppress a statement. And it is your job as an attorney to make clear to the court what kind of motion you are making. It is not your job to try to tell me on the morning of trial that things distinctly from each other are different forms of the same thing. That is not useful to your client because it is not helpful to the court. Don't do that any more. (H14)

(b) The Indictment

The Government secured a multi-count indictment in which it charged the coappellants Kenneth Luke Smith and Frank Wingate with (1) conspiracy to violate the narcotics laws (21 U.S.C. 812, 841(a), 841(b)(1)(A) and (2) the substantive offense of an attempted sale and distribution (21U.S.C. 812, 841(a)(1) 841(b)(1)(A) and 846). It should be noted that the substantive counts of attempt (Counts 2

and 3 of the indictment) were dismissed at the close of the Government's case with the following observations by the court:

> The defendants are acquitted on Counts 2 and 3 because I could not let any jury on this evidence find sufficiently completed preparations with the heroin at some possibly fictional (sic) place in the Bronx and these people at the airport. If ever there was a case where the notion of a locus poenitentiae ought to apply, it is this. (Tr 210-211)

SELECTION OF WINGATE

On the 6th day of June 1974 one Myrel Tyree, who was himself facing drug charges by the Federal Government in Florida, arranged with the Federal Government to seek to catch at random a narcotics dealer in New York City. (Tr125) He would do this by entreating this unknown dealer to buy narcotics in a controlled setting. His random selection of an individual who would become the dealer was the coappellant Frank Wingate.

It should be noted in evaluating the conduct and testimony of Myrel Tyree, that before the start of the trial the Government felt constrained to make a rather startling disclosure as to the veracity of Myrel Tyree. The Assistant United States Attorney disclosed that:

> ...He (Tyree) indicated to the agent that he had gone to South America to buy some cocaine on the instructions of his Florida defendant, that in fact that was not true, that in fact he had gone on his own, and that he had delivered cocaine in the past to his man, but he was not going on this man's instructions... (H7) (parenthesis our own)

While the material false statement by Tyree referred to Tyree's Florida case it should be pertinent in reviewing the present record to which a considerable degree rests upon Mr. Tyree's testimony. In this respect the court should note the reason given by Tyree for the false statement.

> "He told the agent he did this because at the time he was facing a sentincing and he thought it would be of benefit to underplay his role and play up the role of the other Florida defendants, who, in essence, he was cooperating against

in the Florida case." (H 7)

CONTACTS WITH WINGATE

On the 6th day of June 1974, Tyree telephoned the co-appellant Wingate making his initial contact for a "buy" (Ex. 3501). This contact finally culminates in Tyree flying to New York to discuss business with co-appellant Wingate, in a meeting which took place on June 14, 1974 at the Crotona Bar. Present at this meeting were co-appellant Wingate, Tyree, and undercover officer Heyward. (Tr. 31-36)

The meeting ended with money being given to the co-appellant by Tyree and his undercover police associates, so that the co-appellant Wingate could purchase narcotics from his source. (TR. 35-36)

It is during this conversation that the agents and Tyree first hear the co-appellant Wingate refer to "My man" or "His man" or "The man" (Tr. 34).

This attempt at a "buy" from Wingate ended with the return of the money because Wingate could not secure the narcotics (Tr. 34). The reason for the failure of the subject transaction as stated by co-appellant Wingate was the fact that he believed DEA agents were following him (Tr. 36). Wingate, in returning the money to Tyree and the police agents remarked:

...Well, something is wrong; something, somewhere

like that. And I said nothing happened and here is your money (Tr. 39).

THE RETURN OF TYREE

After the aborted transaction in June 1974, Tyree left New York (Tr. 77). Then on the evening of July 1, 1974 Tyree returned to New York and from the airport called Wingate at the Crotona Bar. The telephone conversation by Tyree to co-appellant Wingate as related by Tyree, which induced Wingate to go to the airport, demonstrates the transaction as follows: Tyree testifies:

A. Well, there was just discussion about how it could be done and I told him that I needed to get back immediately and he said, "Well we just can't rush it, you know you have to come down here and do it, if you are going to do it.

Q. Did you make arrangements for the transaction to occur that night?

A. Well, he finally said he would meet me out at the airport and talk to me at the airport. We met at the airport and talked. (emphasis added)

Q. Did he tell you where he was going to get these narcotics?

A. No. The last time I talked to him at the bar he said he had his man with him at the time and he was going to come out to the airport.

Q. When you said he was going to come out to the airport, who did you refer to?

A. Frank.

Q. Did he say his man was going to come out to the airport also?

A. That is what was implied (Tr. 79-80).

Observation

Although the Court sustained the defense's objection to Mr. Tyree's testimony as to what the co-appellant "implied" it is obvious from the verdict that the jury assumed and adopted this implication. This was a crucial point in the case because until the arrest at the airport the appellant Kenneth Luke Smith no where appears on the scene or in the described events (Tr. 80)

"MY MAN, THE MAN, HIS MAN"

The thread of the governments' contrived conspiracy as foisted upon the jury rested to a strong degree upon the co-appellants reference to "his man" or "my man" throughout the time frame of the alleged conspiracy. Notwithstanding the many contradictions in the record as to the pertinent meaning of this reference, the prosecutor would argue to the jury as follows:

> Now lets look at the La Guardia Airport transaction and what happened there. Mr. Wingate calls Mr. Tyree in Virginia and he says he can do the deal as he did last time and they have a narcotics transaction. Mr. Wingate says "I will bring my man" (Tr. 371)

Indeed, reviewing the testimony of the Crotona Bar meeting, the co-appellant did speak of "the man" as his alleged source. Officer Heyward relates:

> "He said maybe the man will bring it. He said

"If you didn't have Marrell with you, I could take you to where the man is and maybe we could sit downstairs when I took the money upstairs and came back. But since Marrell (Tyree) is white, maybe that would attract attention in Harlem, you know seeing who white guys..." (TR 34)

But then, the subsequent use of that term by the coappellant Wingate unequivically put the Government upon notice as to the loose manner in which the term was bandied about by Wingate with no true significance. This is made clear by the incident involving the unindicted coconspirators Edwards.

Officer Haywood relates:

"...At about 6:20 a green Toronado showed up in front of the

Q. Did you see the car?

A. Yes, it parked right in the doorway so you could see it. There was a male and a female black sitting in the car. When the car parked, he (Wingate) said "Oh my man is here now" and he went out to the car and spoke with the people in the car a few minutes. He came back in the car and said "All right, they are ready..."(Tr 35)

Of course, on cross examination, it developed that "my man" in

this instance was not Kenneth Luke Smith:

Q. Did you see Mr. Wingate speak to anyone outside the bar?

A. Yes.

Q. Is that the man (meaning Kenneth Luke Smith) he (Wingate) spoke outside the bar?

A. No, the man was the gentleman driving the green Toronado.

The Government's thread was explained by coappellant Wingate as to his use of the term "my man" as follows:

Q. Now, Mr. Wingate, in the slang of the street, when you refer to your man, you are referring to a friend?

A. Not necessarily a friend, but it might be somebody that is in my presence at the time where I may introduce you to him and I may turn to you and say, this is my man Smitty, this is my man John, this is my man anybody, you know.

Q. Does it imply that that person can do anything in particular?

A. No. (Tr 286, 287)

THE ARREST

At or about 3:00 A.M. on the 2nd day of July 1974, the defendant-appellant Kenneth Luke Smith and the coappellant were arrested by agents of the DEA (H 83).

At the time of the arrest it is undisputed that (1) appellant Kenneth Luke Smith was unknown to the DEA agents; (2) that there were no narcotics present at the scene of the arrest at La Guardia Airport (Tr 210) and (3) that the appellant Kenneth Luke Smith was driving a 1973 white Pontiac which was owned by his girl friend (Ex. 3505). (H 41-42)

SMITH'S STATEMENTS

Appellant Smith, upon his arrest, is taken to DEA headquarters. There he makes an oral statement to an agent. But before appellant gives his statement the following takes place as described by agent Korniloff at the suppression hearing:

> Mr. Smith inquired as to what was going to happen to his car, the car we had took from him at the airport, and I said I was intending to speak to my supervisor and see if there was any way we could seize the vehicle. At that time Mr. Smith became anxious and stated that it wasn't his car and that it belonged to, I believe, a woman he was living with and that he had hurt the woman so many times before, he just couldn't let this happen again, at which time he told us

that evening he was going to obtain some heroin for-I'm sorry, some drugs, for Mr. Wingate that evening and that, you know, if there was any way he could get the car to his woman he would appreciate it. (H41-42)

In considering this statement, the court should note appellant's claim that he was sick from heroin withdrawals. This is corroberated by the testimony of Wingate:

"After we got out there we were arrested, you know and we were taken to 57th Street and on the way sitting there he was more or less leaning-he was telling me "Man, I don't feel good like that (H96).

Wingate goes on to describe appellant Smith's condition:

"Well, he broke into a sweat and he was crouching over like just moving back and forth and, you know, restlessness and the nose was running..."(H97)

Further corroberation came from the very conduct of the former Assistant United States Attorney, Daniel Murphey, who testified:

"And I said we have a program here in this court called a treatment alternative to street crime, and I said, "I don't know whether you qualify for this or not, but I'm going to try to get you into this program. If I try to put you in this program, will you do whatever the probation officer says to work out within this program? And he said he would.

And then I made out the forms for our task program, whatever they are, and referred him to-- (H21) (Tr 309)

POINT I

"EXCEPT FOR THE STATEMENTS MADE BY APPELLANT SMITH, THE GOVERNMENT FAILED TO PRODUCE A SCINTILLA OF EVIDENCE AS TO APPELLANT'S PARTICIPATION IN ANY NARCOTICS CONSPIRACY."

On the evening of July 1, 1974, or in the early morning hours of July 2, 1974, appellant Smith is at the Crotona Bar when a telephone call comes from the Government's agent, Tyree. It is beyond dispute, and no evidence is offered to the contrary, that appellant Wingate, except for the use of the term "My man", made no identification, or gave Tyree any information which would identify appellant Smith as a part of this conspiracy. The only testimony with reference to what occurred in the Crotona Bar came from codefendant Wingate who testifies that he simply asked a very reluctant Smith (who was ill at the time) to drive him to the airport. (Tr 243). (The telephone conversation is between Wingate & Tyree)

So I said, "Wait a minute. Let me see if I can get my man." I said, "I got my man with me now. Let me see if I can get him to take me out to the airport."

So I went over to the car. I didn't get all the way to the car, I got to the outside door and I told him and he was looking towards the door and he came in.

I asked him I said, "Would you mind running me to the airport?"

He said, "I didn't have any gas."

I had a couple dollars in my pocket so I said I will be able to buy some gas. If I get some money I will put some money in your pocket."

He said, "I don't really feel like driving anyway and" - so I told him, I said, "If you don't feel like driving, I'll drive."

He said, "I'll make it." (Tr243)

The record indicates that at the airport Tyree conferred with the codefendant Wingate. The Government's testimony, however, as to whether or not Smith was present in that conversation is in dispute. Agent Magnuson says he observed such a conversation. (Tr 136-137) Agent Korniloff fails to testify to any such conversation. Tyree testified that no such conversation took place. In all circumstances, there is nothing in the record which would indicate Smith's participation in said conversation. In fact it would appear from the testimony of Agent Korniloff that Smith never spoke to Tyree:

> Q. Tell us what you saw in front of the American Airlines terminal?
>
> A. I saw Mr. Tyree and Mr. Wingate engaged in a conversation which lasted about approximately twenty minutes.
>
> Q. Did you see anyone else participate in that conversation?
>
> A. No, sir. (emphasis added)

Q. What happened after that?

A. After they concluded their conversation, I saw Mr. Tyree approach the American Airlines terminal and Mr. Wingate walked towards the LaGuardia Airport terminal parking lot where he met with another individual. (Tr 192)

Thus, the only facts established directly referable to Smith are that he appeared upon the scene with the coappellant Wingate in a car and their actions were devoid of even the hint of criminal activity.

But for statements given by Smith to the agents, nothing could have been proven against Smith, and as demonstrated in Point II of this brief, Smith never gave the Government's agents any call or ground for the arrest, which arrest took place in total absence of the necessary conditions for probable cause. (Tr 182)

Thus, the Government failed to prove that there was any agreement between Smith and Wingate at either the Crotona Bar or at LaGuardia Airport. In fact, the Government failed to prove the existance of a conspiracy as alleged against Smith. In support of this point the appellant requests that the court review the minutes of the grand jury. (Ex. 3509) (Ex. 3507)

POINT II

THE STATEMENTS MADE BY APPELLANT SMITH MUST BE EXCLUDED BECAUSE PROBABLE CAUSE TO ARREST APPELLANT SMITH DID NOT EXIST

Appellant urges that the issue of lack of probable cause is firmly before this court on this record. A timely motion had been filed requesting the suppression of the statements given by appellant Smith pursuant to 41(e) of the rules of Criminal Procedure (see Ex. 12), and this court must now consider the issue of lack of probable cause and the suppression the statements upon the merits. See MORALES v. NEW YORK 396 U.S. 102(1969); GIORDENELLO v. UNITED STATES 357 U.S.480 (1957) and ALBRECHT v. UNITED STATES 273 U.S. 1 (1926).

Had defense counsel been afforded the opportunity to inquire as to what the Government agents knew of appellant Smith prior to arrest, it is beyond dispute that the testimony would have shown no knowledge or information. Under our law the question of the knowledge and information which constitute probable or reasonable cause is examined as of the time of the arrest. The test that is applied has been stated in the following terms:

> Whether a warrantless arrest, made by a state or federal officer is constitutionally valid depends upon whether, at the moment of arrest, the officers had probable cause to make it. Arresting officers have probable cause if at the moment of arrest, the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that...(arrested person) had committed or was committing an offense (citation omitted). In applying that test, the facts as they appeared to the arresting officer must be judged against an objective standard, the subjective good faith of the officer is not

dispositive. (emphasis added)

See also BECK v. OHIO 379 U.S.89, 91, 85 S.Ct.223, 13 L.Ed 2nd 142 (1964); CARROLL v. UNITED STATES, 267 U.S. 132, 162, 45 S.Ct. 280, E9L.Ed.543 (1925); U.S. v. TRAMONTANA, 460 F 2nd 464, 467 (2nd Cir. 1972), and UNITED STATES v. RIVERA, 321 F 2nd 704, 708 (2nd Cir. 1963)
(emphasis appeared in reported case)

United States v. Jit Sun Loo
478 F2d 401, 404
(9th Cir., 1973)

Applying the foregoing constitutional standards of probable cause, it must be determined that as to appellant Smith, the arresting officer had less information and knowledge than the police officer had exhibited in OHIO v. BECK 379 U.S. 89 (1964) where the United States Supreme Court held that recognizing a police photo and having previous knowledge of defendant's criminal record would not constitute probable cause to arrest.

If the arrest of appellant Smith must be considered violative of the constitutional standards, then it must follow that statements obtained prior to arraignment of the appellant Smith must be suppressed. As with the fruits of an illegal search and seizure, the rule of the taint of poison fruit must be applied to appellant Smith's oral statement to the agents of DEA, as well as to the written statement given to the office of the United States Attorney. Both statements secured during detention and prior to arraignment must now be suppressed under the authority of WONG SUN v. UNITED STATES 371 U.S. 471 (1962). In WONG SUN the United States Supreme Court held that statements obtained upon an arrest which lack probable cause will be suppressed.

In reaching such holding the court stated:

> The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in Silverman v. United States, 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects." Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. McGinnis v. United States, 227 F.2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion. See Nueslein v. District of Columbia, 115 F.2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, Rea v. United States, 350 U.S. 214, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, Elkins v. United States, 364 U.S. 206, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction.
>
> Wong Sun v. United States
> 371 U.S. 471, 485-86 (1962)

POINT III

THE STATEMENTS SHOULD BE SUPPRESSED AS BEING INDUCED UPON FALSE REPRESENTATIONS OF GOVERNMENT AGENTS DURING DETENTION AND WHILE APPELLANT CLAIMS TO HAVE BEEN ILL

It is undisputed that by the time the DEA agents reached their office with appellants Smith and Wingate they knew that no drugs had been transported in the vehicle driven by Smith at the time of his arrest.(Tr. 210-211) (Tr 42) Therefore it is urged that the statement by the DEA agent to the effect that he would seek to seize the subject vehicle was not made in good faith but was conveyed as a threat to compel cooperation from appellant Smith. Considering the fact that Smith was ill (Tr 245) this ploy promptly had the desired effect of coercing appellant Smith to tell the agent what he wanted to hear.

It is argued that the interjection of the observation that the agent would attempt seizure and confiscation of a valuable automobile which appellant had borrowed, at a time when the agent knew that the automobile was not utilized in any drug transaction, is a threat or misrepresentation sufficient to negate the voluntariness of the proffered statements. The automobile which might be seized from appellant Smith can be compared to:

(a) the threatened loss of welfare payments in LYNUMN v. ILLINOIS 372 U.S.528 (1963);

(b) the loss of a police officer's job if he would fail to testify and invoke the Fifth Amendment as in GARRITY v. NEW JERSEY 385 U.S. 493 (1966);

(c) the conveyance of the impression that unless the accused will talk his friend, a police officer, may be discharged from the force even though no such circumstances in fact existed. SPANO v. NEW YORK 360 U.S. 315 (1958)

(d) the trick or deceit of an assistant district attorney informing the accused that voluntary means..."anything I ask you, if I ask you a question you will answer the question..." UNITED STATES EX REL VANDERHORST v. LA VALLEE 285 F Supp. 233 (S.D.N.Y. 1968) affm'd. 417 F 2nd 411 (2nd Cir. 1969)

All of the above cases and the case at bar while reflecting factual circumstances and utilizing different methods to force the accused to speak, have a single common result in that the accused's will to resist is erradicated; the accused spoke, and the court suppressed, determining in each instance that the statement was not voluntary.

In the early morning hours in the cold and isolated atmosphere of the custody of DEA agents, and at a time when the record reflects that appellant Smith was ill, it was no great trick to speak the Miranda warnings in form and secure the statement. In one short paragraph of testimony at the suppression hearing the DEA agent recounts how easily this was accomplished:

> Mr. Smith inquired as to what was going to happen to his car, the car we had took from him at the airport, and I said I was intending to speak to my supervisor and see if there was any way we could seize the vehicle. At that time Mr. Smith became anxious and stated that it wasn't his car and that it belonged to, I believe, a woman he was living with and that he had hurt the woman so many times before, he just couldn't let this happen again, at which time he told us that evening he was going to obtain some heroin for-I'm sorry, some drugs, for Mr. Wingate that evening and that, you know, if there was any way he could get the car to his woman he would appreciate it. (H41-42)

Appellant urges that upon the record the trial court should have suppressed the statement following the rule of LYNUMN v. ILLINOIS 372 U.S. 534 where the court in suppressing a forced statement said:

> It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not "cooperate". These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up". There was no friend or adviser to whom she might turn.

> She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.
>
> We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. Chambers v. Florida, 309 U.S. 227; Watts v. Indiana 338 U.S. 49, 52, 53; Leyra v. Denno, 347 U.S. 556, 558. If so, the confession cannot be deemed "the product of a rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208, See also Spano v. New York, 360 U.S. 315; Ashcraft v. Tennessee, 322 U.S. 143; and see particularly, Harris v. South Carolina, 338 U.S. 68, 70.
>
> Lynumn v. Illinois
> 372 U.S. 534 (1963)

Thus, the automobile of substantial value belonging to Mr. Smith's girl friend, and the welfare checks of Mrs. Lynumn may be equated. The effect was the same. In both cases, the will of the defendant to resist making a statement was overcome. The trickery succeeded, and in both cases illegally obtained statements followed.

CONCLUSION

Appellant Smith requests that this court vacate the judgment of conviction and dismiss the indictment.

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Respectfully submitted,
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